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No. 88-855

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CITY OF YONKERS,
Petitioner,
v.
UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR THE CITY OF YONKERS

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In its petition, the City explained that it was filing a petition in this case to protect its interests in the event the Court should grant the petitions of the individual Council members, who had received a stay of their contempt sanctions by this Court on September 1, 1988. *Spallone* v. *United States*, No. 88-854; *Chema* v. *United States*, No. 88-856 and *Longo et al.* v. *United States*, No. 88-870. The Council members have argued that, for a variety of reasons, they are immune from contempt sanctions in the circumstances of this case. The City takes no position with respect to the Council members' arguments; its interests are plainly distinct from those of the individual petitioners. The City's primary concern

is that a holding by this Court immunizing the Council members on any ground will leave the City to bear the full force of any contempt sanction imposed if individual Council members decide not to comply with future district court orders. Respondents have opposed all petitions, but they do not dispute the City's primary argument, *viz.*, if the Court grants the Council members' petitions, it also should grant the City's petition to ensure that its independent interests are fully considered in this dispute.

1. The City has contended that a contempt sanction against it is inappropriate when the noncompliance is the fault of elected officials acting outside the scope of their authority. The argument follows naturally from the settled principle that a contempt sanction is personal and that the contemnor therefore must "carry the key of his prison in his own pocket." *Maggio* v. *Zeitz*, 333 U.S. 56, 68 (1948) (quoting *Penfield Co.* v. *SEC*, 330 U.S. 585 (1947)). If the contemnor cannot on his own comply with the court's order, then the contempt cannot stand. See *Shillitani* v. *United States*, 384 U.S. 364, 371 (1966).

Respondents completely ignore this contention. Instead, they simply cite this Court's decisions under 42 U.S.C. § 1983, in which cities have been held liable for the constitutional torts committed by officials. But those are cases involving a city's liability to pay compensatory damages for past injuries caused by individual officers; they say nothing about whether a city should be exposed to continuing contempt sanctions when a city official's *ultra vires* acts, in defiance of a court order, leave the city with no mechanism available to undo or halt the official's actions.

Respondents make no attempt to explain how the Section 1983 cases in any way extend to the unusual cir-

cumstances in this case [1] or why the fundamental protection in *Shillitani* is not available to the City.[2] The issue of whether the City can be punished by contempt for a wrong it cannot correct is an important one that this Court has never decided. Moreover, if the Court grants the individual Council members' petitions, it should grant the City's petition so that the interests of the City will, at least, be a factor for the Court to consider in deciding the extent, if any, of the Council members' immunity.

2. With respect to the City's argument that the magnitude of the fines imposed upon it implicate the Eighth Amendment's Excessive Fines Clause, the United States acknowledges (Opp. 23) that the Court has before it the issue of whether the Excessive Fines Clause applies to civil proceedings. *Browning-Ferris* v. *Kelco Disposal,*

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[1] Contrary to respondents' suggestion, this Court's prior interpretations of Section 1983 actually support the City's position that a municipality can be treated as a distinct entity depending upon the nature of the individual city official's conduct. In *City of Newport* v. *Fact Concerts*, 453 U.S. 247 (1981), this Court held that a city cannot be held liable for punitive damages in a situation where punitive damages could rightly be imposed upon individual officials. Section 1983 itself makes clear that, even though a city can be held liable for an official's conduct, it does not follow that the city should be exposed to the same remedy that is appropriate for the official. Thus, the fact that the Council members properly could be held in contempt says nothing about whether the City also should be held in contempt.

[2] The United States draws support (Opp. 23) for its position from the fact that two Council members eventually switched their votes and complied with the court's order. The problem with that logic is that it begs the question of whether the City should have been held in contempt. If, for example, the district court had imposed the contempt punishment upon the Council members' families, that also would have led to an eventual shifting of votes, but it would not justify the imposition of the contempt sanction in the first place. Thus, the fact that two members of the Council eventually stepped in to protect the innocent residents of Yonkers says nothing about the validity of the underlying order against the City.

Inc., cert. granted, No. 88-556 (Dec. 5, 1988). In *Browning-Ferris,* the issue is whether the Clause limits the magnitude of a punitive damages award. While it is true that there are distinctions between ordinary civil contempt and punitive damage situations, this case does not involve a typical civil contempt sanction. As we have already shown, the City could not purge itself of this contempt. Moreover, the district court's use of contempt, when it had equally effective alternative remedies available to it,[3] plainly indicates that the fine in this case was designed to punish the City. Whether such punishment is subject to the Excessive Fines Clause is an issue upon which the Court's disposition in *Browning-Ferris* may shed significant light.[4] Accordingly, at a

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[3] At the August 2 "show cause" hearing, the City urged the district court to respond to the Council members' vote by deeming the legislation to have been duly enacted (as the court had done before). Br. of Defendant-Appellant City of Yonkers, No. 88-6178 (2d Cir.), p. 14. The district court declined to entertain discussion of this alternative.

The United States misleadingly states (Opp. 9 n.12) that "[t]he City, speaking as usual on behalf of the City Council, opposed creation of the Commission . . . ." The government's statement is only true prior to the vote of the City Council. Up to that point there was no reason to assume that the City's and the City Council's interests were divergent. After the City Council voted to defy the district court, then the City's interests were no longer being adequately protected by the City Council and subsequent to that time legal counsel for the City, as a corporate entity, supported use of the Commission as an alternative to imposing sanctions upon the residents of the City. Thus, the remedy of appointing a housing commission was clearly available to the district court as an alternative to the imposition of "bankrupting fines."

[4] Respondents point to the magnitude of the fines and conclude that the sum, which was less than $1 million, could not be "excessive." But that facile conclusion depends upon their assertion that the City is fully responsible for the failure of the Council members to act in compliance with the district court's order. If the City is correct that it was powerless to purge itself of the contempt, then the imposition of *any* monetary penalty arguably is excessive. *Cf.*

minimum the Court should hold the petition pending its decision in *Browning-Ferris.*

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted. Certiorari here is particularly appropriate to protect the interests of petitioner if the Court grants the petitions of the individual Council members in Nos. 88-854, 856, 870. Alternatively, the Court should hold this petition pending its decision in *Browning-Ferris* v. *Kelco Disposal, Inc., cert. granted,* No. 88-556 (Dec. 5, 1988), and then dispose of the petition as appropriate in light of that decision.

Respectfully submitted,

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Solem v. *Helm,* 463 U.S. 277, 287 (1983) (" 'Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold' ") (quoting *Robinson* v. *California,* 370 U.S. 660, 667 (1962)).